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**Oranga Tamariki Legislative Reform: an Affirmation  
of New Zealand's Commitment to The United Nations  
Convention on the Rights of the Child?**

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## **Oranga Tamariki Legislative Reform: an Affirmation of New Zealand's Commitment to The United Nations Convention on the Rights of the Child?**

### *Abstract*

*The United Nations Convention on the Rights of the Child guarantees basic and fundamental rights for children and young people universally. Since ratification in 1993, New Zealand continues to take steps to bring domestic legislation into line with this comprehensive human rights treaty. This article examines to what extent the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017 gives effect to the rights set out in the Convention with a particular focus on the youth justice sector. A close analysis of the effect of s 5(1)(b)(i) which purports to mandate that the child's or young person's rights as set out in the Convention must be respected and upheld in the exercise of powers under the Act is undertaken. Despite s 5(1)(b)(i) explicitly referring to the Convention, the conclusion reached is this section merely legislates the current practice of the Courts and other decision-making bodies, that is, the rights set out in the Convention should be used as guiding principles when making decisions concerning children and young people. This article highlights the inconsistencies in the current legislation, and the legislation Act, which must be resolved before comprehensive incorporation of the Convention rights can be considered.*

### *Keywords:*

Oranga Tamariki Legislation Act 2017

Convention on the Rights of the Child ("CRC")

Children and Young People's Rights

Youth Justice

## *I. Introduction*

By 1 July 2019 all provisions in the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017 (“The Legislation Act”) will come into effect. This Legislation Act amends the existing Children, Young Persons, and Their Families (Oranga Tamariki) Act 1989 (“Oranga Tamariki Act”) which currently provides a framework for dealing with the care and protection of children and young people, and youth justice matters. The Legislation Act introduces a child-centred approach to the legislation. A child-centred approach has not been clearly defined, however a successful implementation of a child-centred approach is expected to result in improvement in the experiences and outcomes of children, young people and their families who come into contact with the care and protection system, as well as the youth justice sector.<sup>1</sup> The Legislation Act also takes steps to further align its principles and provisions with international human rights treaties, namely, the United Nations Convention on the Rights of the Child (“the Convention”) and the United Nations Convention on the Rights of Persons with Disabilities (“CRPD”).<sup>2</sup>

An international treaty is an international agreement governed by international law entered into by States in one or more written instruments.<sup>3</sup> Treaties may also be concluded by international organisations or states that are not party to the Vienna Convention, but in these circumstances the Vienna Convention rules will not apply. The underlying principle for an instrument to be a treaty is that it creates rights and duties enforceable under international law.<sup>4</sup>

The dualist theory of international law as practised in New Zealand describes domestic law and international law as two distinct legal systems. International law governs relationships between states while domestic law governs national relationships between individuals, and with Government.<sup>5</sup> Under a dualist theory,

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<sup>1</sup> Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill (224-3) (Regulatory Impact Statement) at [15].

<sup>2</sup> Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017, s 5(1)(b)(i).

<sup>3</sup> Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980, art 2(1)(a).

<sup>4</sup> Law Commission *International Law and the Law of New Zealand* (NZLC R34, 1994) at [36].

<sup>5</sup> Above.

international treaties are not enforceable in domestic law by ratification.<sup>6</sup> Ratification is the acceptance or confirmation by signature of a State, and has the effect of binding the State at an international law to the obligations contained in the ratified treaty.<sup>7</sup> The important point is that ratification is only binding on States at the international level. A treaty will only become enforceable under domestic law where the Treaty is given statutory force in legislation, or, by incorporation of substantive rights in the treaty into domestic legislation.<sup>8</sup>

The Convention is an international treaty which enshrines specific rights in international law afforded to children and young people. Children and young people are defined in the Convention as any human under the age of 18 years.<sup>9</sup> The Convention was adopted by the United Nations, an international organisation made up of member States chartered to act on global issues such as human rights, peace and security, and other international issues in 1989.<sup>10</sup> New Zealand ratified the Convention in 1993 indicating its acceptance to be bound at an international level by the rights and obligations set out in the Treaty, with certain reservations. The main reservation relevant for our purposes is the reservation to mix adult offenders and juvenile offenders in the same detention facilities.<sup>11</sup>

Since ratification the Government is required to make a periodic report to the Committee on the Rights of the Child (“the Committee”) in the first two years, and then periodically every five years, on policies and procedures in place to fulfil New Zealand’s international obligations under the Convention. The Committee acts as a supervisory body to monitor each nation’s progress in complying with and implementing the rights enshrined in the Convention. In September 2016, the Committee published their concluding observations on the fifth periodic report of New Zealand. The report reiterated the “indivisibility and interdependence of all rights under the Convention” and urged the planned amendments to the Children,

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<sup>6</sup> Oona A. Hathaway *Between Power and Principle: An Integrated theory of International Law* (2005) 72 U.Chi.L.Rev. 469 at 498, n 72.

<sup>7</sup> Above n 4, at [31].

<sup>8</sup> Above n 4.

<sup>9</sup> Convention on the Rights of the Child GA Res 44/25 (1989), Art 1.

<sup>10</sup> Charter of the United Nations, Art 1.

<sup>11</sup> Committee on the Rights of the Child *Concluding Observations on the fifth periodic report of New Zealand* CRC/C/NZL/CO/5 (2016) at [5].

Young Persons, and Their Families Act 1989 bring domestic legislation into compliance with the provisions and principles of the Convention.<sup>12</sup> Notable recommendations included raising the age of criminal majority to 18 years, withdrawing New Zealand’s reservation to Article 37(c) concerning mixing of juvenile and adult offender populations and reducing detention of children in police custody.<sup>13</sup> The Committee noted New Zealand had not progressed in the area of juvenile justice since its last report and urged that the Committee’s recommendations be implemented.<sup>14</sup>

The Legislation Act received the Royal Assent on 13 July 2017. Section 5(1)(b)(i) purports to expressly require consideration of the rights enshrined in the Convention. It was submitted this section sets the expectation that a human-rights-based lens should be used as the over arching framework in interpreting and applying the legislation.<sup>15</sup>

S 5(1)(b)(i) provides –

Section 5(1) The well-being of a child or young person must be at the centre of decision making that affects that child or young person, and, in particular -

(i) the child’s or young person’s rights (including those rights set out in UNCROC and the United Nations Convention on the Rights of Persons with Disabilities) must be respected and upheld, and the child or young person must be –

(A) treated with dignity and respect at all times:

(B) protected from harm.

A review of submissions during the process of the Legislation Act in the House demonstrates the lack of understanding of this section and, what consequences it may have for the treatment of children and young people under the Oranga Tamariki Act, particularly for those in the youth justice sector. While many submitters commented on the positive step of an explicit reference to the Convention in s 5(1)(b)(i), there was no consensus as to the effect of this section. Some submitters considered

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<sup>12</sup> At [4].

<sup>13</sup> At [45].

<sup>14</sup> At [45].

<sup>15</sup> Save the Children “Submission to Social Services Committee on the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill”.

s 5(1)(b)(i) to set an expectation that the rights of children and young people set out in the Convention must be met at all times in policy and legal decision-making.<sup>16</sup> Others were certain that the legislation does not go far enough to create a system that is fully compliant with the Convention.<sup>17</sup> For example, it was argued that any meaningful steps towards compliance through the raising of the age of criminal majority to include 17 year olds is undermined by the substantial carve outs for 17 year olds who have committed certain offences, who will not be within the Youth Court jurisdiction.<sup>18</sup>

The Legislation Act has been criticised for being presented as an omnibus Bill. It was submitted the substantive changes to diverse parts of the Act should have been proposed in separate bills to ensure MPs and the public had sufficient information and time to scrutinise and respond to each proposed amendment.<sup>19</sup> If this approach had been adopted it may be that the consequences and effect of this section would be better understood. This paper explores the possible interpretations of this section and the potential consequences for children and young people in the youth justice sector with a particular focus on how judicial decision-making may be affected.

## *II. The Convention in the New Zealand Courts'*

Interpretation of New Zealand legislation by Judges is guided by legislative and common law principles. Section 5 of the Interpretation Act 1999 provides that the meaning of an enactment must be ascertained from its text and in light of its purpose. Indication such as the preamble and section headings can also be considered in ascertaining meaning.<sup>20</sup> Section 6 of the Bill of Rights 1990 provides that where an enactment can be given a meaning consistent with the rights and freedoms contained in the Bill of Rights, that interpretation should be preferred. These legislative examples demonstrate Parliament's intent for Judges to use other instruments and

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<sup>16</sup> Above.

<sup>17</sup> UNICEF "Submission to Social Services Committee on the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill".

<sup>18</sup> (29 June 2017) NZPD Jan Logie.

<sup>19</sup> No Pride in Prisons "Submission to Social Services Committee on the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill".

<sup>20</sup> Interpretation Act 1999, s 5.

principles outside the natural and ordinary meaning of the statute in front of them to guide the interpretation of statutes.

On this basis, the Court of Appeal in *Tavita v Minister of Immigration* accepted a general proposition that decision-makers should strive to interpret legislation consistently with treaty obligations.<sup>21</sup> The Court did not accept the Government's argument that the Minister was entitled not to consider the Convention, amongst other international treaties, on the basis that they had not been incorporated into domestic legislation, rather preferring an approach that viewed consideration of international rights and obligations a necessary consequence of ratification.<sup>22</sup>

These same sentiments were reflected in the more recent decision of *DP v R* where the Court of Appeal affirmed their statement made over 20 years prior, holding that “when dealing with a child charged with a criminal offence, a Court *must* recognise the United Nations Convention on the Rights of the Child”.<sup>23</sup> The Court of Appeal overturned the earlier High Court decision partly on the basis of the High Court Judge's failure to consider necessary particular characteristics of the young person, as required by the Convention. The Court went on to grant DP permanent name suppression stating “in all respects concerning children, including publication of name, the child's best interests shall be a primary consideration”.<sup>24</sup> This case is a good example of the Court's willingness to use its statutory interpretation powers to recognise and give effect to New Zealand's treaty obligations, particularly fundamental human rights instruments such as the Convention so far as they do not conflict with domestic legislation.

This interpretative power is also demonstrated down the hierarchy of Courts. The Principal Youth Court Judge, Judge Walker, earlier this year released a decision on an application for conviction and transfer to the District Court for sentencing for a young person who was proved to have committed serious offences. When setting out the principles the Principal Judge felt he must be guided by, he referred to the specific Youth Court principles set out in s 208, Oranga Tamariki Act and the general

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<sup>21</sup> *Tavita v Minister of Immigration* [1994] 2 NZLR 257.

<sup>22</sup> At 266.

<sup>23</sup> *DP v R* [2015] NZCA 476 at [10] (emphasis added).

<sup>24</sup> At [10].

principles in s 5 of the Act.<sup>25</sup> He went on to set out the international instruments he considered also needed to be taken into account, namely Article 37 of the Convention and Rule 19 of the Beijing Rules.<sup>26</sup> After balancing the relevant considerations, Judge Walker in reliance on the Convention, and s 5 and s 208 principles, was persuaded that a conviction and transfer to the Adult Court was not in the young person's best interests, and the interests of the victim and the public could adequately be met by the powers of the Youth Court.<sup>27</sup>

This brief account of judicial decision-making taking into account international instruments such as the Convention reflects the position in New Zealand today. While the Convention may not be part of domestic legislation, it is a fundamental instrument to interpretation. The Courts have indicated that ratification of international instruments has the consequence of making the instrument part of our judicial structure.<sup>28</sup> That is, following ratification it is a reasonable expectation that those subject to the New Zealand jurisdiction have direct rights of recourse to the Convention.<sup>29</sup> On this basis, a necessary consequence of Parliament's ratification of the Convention in 1993 is that the rights and obligations expressed under the Convention should be used as an aid to statutory interpretation and judicial decision-making.

Once all the provisions of the Legislation Act come into force, the application of s 5(1)(b)(i) will be considered by all judicial and policy decision-makers in matters concerning children and young people under the Act. As discussed, the Convention is already treated as a relevant consideration when making decisions concerning children and young people but it is unclear how s 5(1)(b)(i) may alter this practice. A broad interpretation of s 5(1)(b)(i) which holds that the section has the effect of formally incorporating all the rights in the Convention into domestic legislation would give key decision-makers a much wider power to make decisions in reliance on upholding these rights. However, there is a competing interpretation that must also be considered. That is, s 5(1)(b)(i) does not go so far as to give the Convention rights

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<sup>25</sup> *Police v SD* (2018) NZYC 169 at [3] and [4].

<sup>26</sup> At [5].

<sup>27</sup> At [47].

<sup>28</sup> Above n 21, at 266.

<sup>29</sup> Above.

statutory force, rather, mandates that decision-makers must be guided by these rights when exercising powers under the Act. There are key features of the Legislation Act, and principles of international and public law that suggests the former, broad interpretation of s 5(1)(b)(i) is not open as the legislation currently reads. Substantive inconsistencies between a formal incorporation of the Convention rights, and other provisions included in the Legislation Act, as well as ambiguous language, suggest Parliament could not have intended to use s 5(1)(b)(i) to formally incorporate the rights set out in the Convention. Rather, it is proposed that s 5(1)(b)(i) was intended by Parliament to legislatively capture the importance of such a fundamental human rights treaty and give the current practices employed by the Court, of using the Convention as an interpretative tool, legislative grounding.

### *III. The Legislative Framework*

This section has been described as an explicit recognition and affirmation of the rights of children and young people under the Convention to an unprecedented extent.<sup>30</sup> To this end, this amendment reflects Parliament's acknowledgment of the important link between the Convention rights and care and protection and youth justice provisions under the Oranga Tamariki Act. Whether this section can be read to extend to a formal incorporation of the Convention rights in domestic legislation should be ascertained from its legislative context within the Act.

Section 5 principles offer important guidance on the application of the Oranga Tamariki Act but, as demonstrated by the wording of s 5, are only intended to be a guide. A strict application is not provided for. Thus, while it is necessary for decision-makers to consider the relevant principles in s 5, decision-makers are not legislatively required to strictly apply each principle in making their decision. This applies to s 5(1)(b)(i) where it could be said that the reference to the Convention is intended to form another factor for guidance, rather than providing for a strict application of the Convention rights.

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<sup>30</sup> Human Rights Commission "Submission to Social Services Committee on the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill".

### *A. Section 5(1)(b)(i) Interpretation*

There are two possible interpretations of s 5(1)(b)(i) which may be adopted. First, a broad interpretation which gives the section the effect of formally incorporating the rights set out in the Convention into domestic legislation, that is, giving the Convention rights the force of law, and the second, a narrow interpretation which interprets the section as mandating that decision-makers under the Act ensure their decisions are guided by the rights in the Convention, and consider the extent to which such decisions uphold and respect those rights. On the basis of a narrow interpretation, where decisions are not consistent with the Convention rights, a decision-maker is not bound to change his or her decision if the decision can be justified on another principled basis.

While s 5(1)(b)(i) expressly mentions the rights set out in the Convention, it does not automatically follow that this reflects express incorporation of the Convention rights giving statutory force. This becomes apparent when comparing this section with s 3(2)(f) of the Care of Children Act 2004 (“COCA”) which states:

Section 3 – Purpose of this Act

(2) To that end, this Act –

(f) implements in New Zealand law the Hague Convention on the Civil Aspects of International Child Abduction.

It is an important principle of the dualist theory of international law that Parliament must clearly indicate its intent to make international treaties enforceable in domestic law before they will be considered as such.<sup>31</sup> To interpret an ambiguous reference to an international treaty in legislation as formal incorporation would be undermining Parliamentary sovereignty. That is, while the Executive can enter into binding treaties at the international law level, Parliament, as supreme law-maker, has the exclusive power to give treaties the force of domestic law.<sup>32</sup> This power must be exercised through clear Parliament intent. This distinction is clearly demonstrated by the obvious language differences between s 3(2)(f), COCA and s 5(1)(b)(i) of the Legislation Act. Through s 3(2)(f) COCA, Parliament has expressly stated its clear

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<sup>31</sup> Law Commission, above n 4.

<sup>32</sup> Law Commission, above n 4.

intention to implement the Hague Convention into domestic legislation giving all the rights and interests set out in the convention the force of law within New Zealand. This intention is not clear in s 5(1)(b)(i). Rather, the language suggests the Convention is included in s 5(1)(b)(i) as a factor to be considered amongst other guiding principles.

This same distinction can be demonstrated with comparison to overseas domestic legislation such as Part 1 of the Children and Young People (Scotland) Act which provides that Scottish Government ministers should “keep under consideration whether there are any other steps which they could take which would or might secure better or further effect in Scotland of the UNCRC requirements”.<sup>33</sup>

We can take guidance from the Scottish interpretation of Part 1 because it reads similarly to s 5(1)(b)(i). The position has been confirmed in Scotland that while this Part requires Scottish decision-makers to always consider whether their actions or decisions are consistent with the Convention rights, it is only a directory provision.<sup>34</sup> Where decision-makers recognise that their decision is inconsistent with the Convention rights, or an alternative decision would better uphold these rights, they are not legally bound to change their decision.<sup>35</sup> Thus, it follows that s 5(1)(b)(i) may be better interpreted as a directory provision as opposed to an incorporation of the Convention rights which would require decisions to be compliant with the Convention to be valid.

### *B. Child-Centred Approach*

A key purpose of the Legislation Act was to update the general principles of the Oranga Tamariki Act to better incorporate the elements of a child-centred system.<sup>36</sup> It is recognised that the objects and principles of the Act set out in s 4 and s 5 underpin all aspects of practice and decision-making about matters within the scope of the Act.<sup>37</sup> This is reaffirmed in s 5 which states “any court which, or person who,

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<sup>33</sup> Children and Young People (Scotland) Act 2014, pt 1.

<sup>34</sup> *What legal force does the UNCRC have?* Children and Young People’s Commissioner Scotland [www.cypcs.org.uk](http://www.cypcs.org.uk).

<sup>35</sup> Above.

<sup>36</sup> Above n 1, at [9].

<sup>37</sup> Above n 1, at [7].

exercises any power conferred by or under this Act shall be guided by the following principles”.<sup>38</sup> The content of the principles contained in the Oranga Tamariki Act prior to the amendments have been identified as significant contributors to the current lack of child-centred practice, evidenced by negative experiences of children, young people and their families, and poorer long-term outcomes of vulnerable children and young people.<sup>39</sup>

Whilst the notion of a child-centred approach is generally positive, there is a conceptual uncertainty as to how authorities and organisations should adopt a child centred decision-making approach. Service providers are uncertain about how to bring their delivery of services in line with these legislative requirements.<sup>40</sup> This child-centred approach is encapsulated throughout the Legislation Act but neither the Bill or the Act offers a definition of what it means to be child-centred and more importantly, what steps must be taken to ensure agencies and people are achieving a child centred approach.<sup>41</sup>

One approach is to view child-centred synonymously to a best interest approach although it is arguable that if this was what was intended, the same phrase should have been employed. On the basis that the principles of the Oranga Tamariki Act play a central role in the provision of services and decision-making under the Act a child-centred approach may be better conceptualised as an approach that considers collectively the principles in s 5 of the Act and takes measures to ensure these principles are upheld. In doing this, organisations and decision-makers move away from applying a rigid definition of child-centred to comply with obligations under the Act, and adopt a holistic view of child-centred as a guide for best practice and decision-making. This interpretation of child-centred appears consistent with the rationale of amending the s 5 principles and the interpretation of s 5 as a general guiding provision.

An example of this would be a young person, aged 15, appearing before the Youth Court who presents with significant welfare issues to such an extent that Oranga

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<sup>38</sup> Oranga Tamariki Act, s 5.

<sup>39</sup> Above n 1, at [8].

<sup>40</sup> Office of Children’s Commissioner “Submission to Social Services Committee on the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill”.

<sup>41</sup> Above.

Tamariki deems the young person to be in need of care and protection.<sup>42</sup> A significant area of concern in these circumstances is the removal of young people from their families, schools and their communities in response to care and protection concerns and the young person being placed with an unknown family in an unfamiliar community. The harm created by this disruption to the young person and his or her family is extreme and a recognised problem that was intended to be remedied by the Legislation Act.

A child-centred approach under the Legislation Act would draw on principles in s 5 such as s 5(1)(a) which encourages the participation of the young person, and consideration of their views, s 5(1)(c)(i) which acknowledges the importance of the family group in care matters, s 5(1)(c)(iv) which looks to maintain and strengthen the relationship between the young person and their family, and s 5(1)(c)(v) encouraging participation and consideration of the young person's family's view. In these circumstances, it can be made clear that the young person will not be permitted to return to live with their existing caregivers, but a solution where the young person is able to live with their Auntie who lives in the same community and who has a strong relationship with the young person, and the young person could continue attending the same school and have supervised visits with their mother and father and siblings would give effect to these principles. A resolution of this nature uses the guiding principles to ensure the young person's wellbeing is protected by not continuing to live in the environment which has been identified as risky whilst giving weight to the recognised interests of the young person as set out in s 5. This holistic approach produces an outcome which meets the needs of the young person, the young person's family and the child welfare service. A decision-making process of this nature is likely what is meant by a child-centred decision-making approach.

### *C. Best Interests Principle*

Section 6 of the Oranga Tamariki Act provides that the welfare and interests of a child or young person shall be the first and paramount consideration, with the express exception of youth justice matters. This section gives children and young people in the care and protection part of the Act the protection under Article 3 of the

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<sup>42</sup> Section 67.

Convention. That is, the best interests of the child or young person should be a primary consideration.<sup>43</sup> There is an argument that Parliament goes further than Article 3 in this respect to make the interests of a child or young person *the* paramount consideration as opposed to *a* paramount consideration.<sup>44</sup> This suggests that under s 6 the best interests of the child must be the first and primary consideration, while under Article 3 the best interests of the child are one consideration which may be considered alongside, but not superior to, other considerations such as the public interest.

Section 6 gives the substance of the right contained in Article 3 of the Convention statutory force. Parliament has restricted the application of this right in domestic legislation by excluding youth justice matters from the scope of s 6. The exclusion of youth justice matters is inconsistent with Article 3 which does not distinguish between protection for children and young people in care and protection matters, or youth justice. If a broad interpretation of s 5(1)(b)(i) was to be adopted, there is an argument the best interests principle would apply to children and young people in the youth justice sector by virtue of Article 3 imported through s 5(1)(b)(i), despite s 6 clearly excluding such application. This could result in decision-makers circumventing the exclusion in s 6 by importing the best interests principle through s 5(1)(b)(i). However, Parliament has specifically addressed the best interests principle application to youth justice matters in the Legislation Act.

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<sup>43</sup> Article 3.

<sup>44</sup> Section 6.

Section 4A of the Legislation Act reinterprets and expands on the best interests principle in s 6 of the Oranga Tamariki Act and expressly provides a framework for its application in youth justice matters. Section 4A(2) provides that:

- (2) In all matters relating to the administration or application of Parts 4 and 5 and section 351 to 360, the 4 primary considerations, having regard to the principles set out in sections 5 and 208, are –
- a. The well-being and best interests of the child or young person; and
  - b. The public interest (which includes public safety); and
  - c. The interests of any victim; and
  - d. The accountability of the child or young person for their behaviour.

This section is consistent with Article 3 of the Convention as the well-being and best interests of the child are a paramount consideration for youth justice matters. This new section supports a narrow approach to be favoured. Through s 4A(2) Parliament has incorporated the substantive Article 3 into domestic legislation for youth justice matters. If Parliament had intended for s 5(1)(b)(i) to formally incorporate the Convention rights into law, it would be unnecessary for s 4A(2) to make provision for the paramountcy principle as a primary consideration for youth justice matters as this could be imported through s 5(1)(b)(i).

Further, s 4A(2) provides for a hierarchy of considerations. That is, s 4A(2)(a)-(d) are the four primary considerations when making decisions under the Act which are balanced against each other having regard to s 5 and s 208 principles. Thus, s 5(1)(b)(i) can be viewed as a secondary consideration which may be used to resolve inconsistencies between s 4A(2)(a)-(d), but does not form a primary consideration in this exercise.

#### *IV. Substantive Inconsistencies*

##### *A. Age of Criminal Majority*

The Convention defines a child or young person as any human up to the age of eighteen years, unless in the law of that country the age of majority is reached first.<sup>45</sup>

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<sup>45</sup> Article 1.

In the Committee's concluding observations for 2016, the Committee reiterated its recommendation that the age of criminal majority be raised to 18 years.<sup>46</sup> New Zealand has frequently been criticised for its age of criminal majority of 17 years, that is, by a young person's 17<sup>th</sup> birthday, any criminal offending will be dealt with in the Adult Court. This treatment of 17 year olds is clearly inconsistent with the rights and protections set out in the Convention, and the United Nations recommended definition of a child.

The Legislation Act goes some way to bringing New Zealand in to line with our obligations under the Convention. The definition of a young person in s 2(1) of the Oranga Tamariki Act is amended by the Legislation Act to "a person of, or over, the age of 14 years but under 18 years".<sup>47</sup> This section purports to give all young people, up to the age of 18 years old, the same rights and protections under the Act. However, this is not the case. Section 272 of the Oranga Tamariki Act sets out the jurisdiction of the Youth Court and children's liability to be prosecuted for criminal offences. Currently, a child or young person under the age of 17 will only be automatically transferred to the Adult Court if they are over the age of 10 years and are charged with murder or manslaughter, or for serious or persistent offending by 12 or 13 year olds.<sup>48</sup> Section 113 of the Legislation Act adds an additional exception offence to s 272, namely, if the young person is 17 years old and commits an offence specified in Schedule 1A, he or she will also be dealt with by the Adult Court.<sup>49</sup> Schedule 1A is a list of specified offences for young persons which have been referred to in Parliamentary debate as serious crimes committed by high risk 17 year olds which will be outside the Youth Court jurisdiction.

The effect of s 113 of the Legislation Act undermines the redefinition of young person to include 17 year olds by creating a large carve out. In doing so, the Act can be considered more inconsistent with Convention obligations as the boundaries between the Youth Court and adult Court is no longer defined strictly by age, but by severity of offending. This is inconsistent with a key underlying principle of the Convention that children and young people have recognised special needs different to

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<sup>46</sup> Above n 11 at [45].

<sup>47</sup> Section 7(4).

<sup>48</sup> Section 272.

<sup>49</sup> Section 113(4).

adults so should be dealt with in a separate system for criminal justice.<sup>50</sup> Increasing the age of criminal majority to 18 years old, but imposing significant carve outs, is unlikely to be what was envisaged by the Committee in recommending New Zealand bring the current amendments into line with the indivisible rights of the Convention. This division of 17 year olds between the Youth Court and the adult Court is a clear breach of the rights set out in the Convention and does not support a broad interpretation of s 5(1)(b)(i) of the Legislation Act.

### *B. Detention of Young People*

Article 37 enshrines fundamental rights of children and young people that should be upheld where there is a deprivation of a child's or young person's liberty. These include that no child shall be subjected to torture or other cruel, inhuman or degrading treatment and punishment, and the arrest, detention or imprisonment of a child shall be used only as a last resort.<sup>51</sup> Article 37 also requires that any child or young person deprived of liberty be kept separate from adults. This Article is engaged when making decisions about remand while a young person is waiting for their next hearing and making final orders for young people in the youth justice system.

Currently there are five options under s 238(1) for a Court to consider when determining where a child or young person should be placed while they wait for their next court appearance. These include releasing the child or young person with certain conditions, or ordering the child or young person into the custody of Oranga Tamariki who must find a suitable place for the young person to reside, such as a youth justice residential facility.<sup>52</sup> A highly controversial order is s 238(1)(e) which gives the Court the power to order the young person to be detained in a police cell where the young person is likely to abscond or be violent, and where suitable facilities for the detention in safe custody of that young person are not available.<sup>53</sup> While the Legislation Act introduces a requirement that the Youth Court review a s 238(1)(e) order every 24 hours, there is no time limit for how long a young person may be held in Police cells until they must be moved to a suitable facility or be released. In 2011, 213 young

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<sup>50</sup> Article 37.

<sup>51</sup> Article 37.

<sup>52</sup> Section 238(1)(a), s 238(1)(b), s 238(1)(c), s 238(1)(d).

<sup>53</sup> Section 239.

people were detained in police cells for an average detention period of 1.9 days and it was predicted that this trend was rising.<sup>54</sup>

The holding of children and young people in police cells for an indefinite amount of time is a clear violation of the rights set out in Article 37. Police cells are not physically designed to house any person for a number of days, and the ability to provide food to those in custody and access to basic hygiene facilities is well below what would be reasonably expected for any human being held for more than 24 hours.<sup>55</sup> The use of police cells to hold children and young people for an indefinite amount of time could certainly be described as inhuman and degrading treatment. Further, there are no separate youth police cells and adult police cells. Thus, young people may be required to mix with adult prisoners to use showering facilities as well as travelling to and from Court.<sup>56</sup>

The current law does not permit children and young people on remand to be held in custody at adult prisons. This is consistent with the spirit of Article 37 which calls for the lowest possible deprivation of liberty of children and young people. However, the Legislation Act inserts a new s 239(2A) providing that a young person aged 17 years may be detained in custody in prison, on application, where the Court is satisfied the order is necessary to ensure the safety of a young person and there is a youth unit available. Thus, while the Legislation Act is brought more in line with the Convention by increasing the age of majority to 18 years, there is a further carve out which allows 17 year olds to be detained in prisons on remand.

It is clear that despite the intention for the Legislation Act to make New Zealand compliant with the Convention, the substantive carve outs and inconsistencies mean it cannot be said the Legislation Act upholds New Zealand's obligations under the Convention. The use of police cells to hold children and young people, mixing of adult and juvenile populations in detention facilities and the more severe treatment of certain 17 year olds in the justice system mean a broad interpretation of s 5(1)(b)(i) is inconsistent with the legislative intent conveyed throughout the Legislation Act.

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<sup>54</sup> Judge Sir David. J. Carruthers, Dr. Russell Wills, and David Rutherford Joint Thematic Review of Young Persons in Police Detention (Independent Police Conduct Authority, Children's Commissioner, Human Rights Commission, October 2012) at [3].

<sup>55</sup> At [7].

<sup>56</sup> At [7].

## V. *An Australian Comparison*

The preferred narrow interpretation is consistent with the interpretation proposed in Australia where a similar section was introduced to the Family Law Act in June 2012. Section 60B(4) provides, “an additional object of this Part is to give effect to the Convention on the Rights of the Child done at New York on 20 November 1989”.<sup>57</sup>

The status of the Convention was similarly questioned in Australia during this time with some arguing the section created a statutory imperative for the rights set out in the Convention to be considered in decision-making, while others argued the section merely confirmed the common law position that the Convention is to be used as an aid to interpretation.<sup>58</sup> This matter was conclusively dealt with by a Replacement Explanatory Memorandum which confirmed the section did not intend to have the effect of incorporating the Convention into domestic legislation and to the extent the Act departed from the Convention, the Act would prevail.<sup>59</sup> However, the discussion about what interpretation was best supported in the legislative context, and the effect of each interpretation on decision-making is directly relevant to our current enquiry.

The writer raised two key arguments as to why s 60B(4) would have little impact on decision-making which are relevant for our purposes; first, the writer argued because the Convention was not part of Australian Domestic law, its actual influence on decision-makers is minimal and second, because s 60B is an objects and principles section, its impact on adjudication of individual decisions has little impact.<sup>60</sup>

The first argument can be disposed of quickly. The current law in Australia and New Zealand is settled. The Australian Case of *Teoh* is authority for the principle that the ratification of an international treaty gives rise to a legitimate expectation that decision-makers will act in accordance with the principles of the Convention.<sup>61</sup> This is consistent with the established approach of the New Zealand Court’s discussed

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<sup>57</sup> Family Law Act 1975 (Aus), s 60B(4).

<sup>58</sup> Michelle Fernando (2013) UNSW Law Journal 36(1) Express Recognition of the UN Convention on the Rights of the Child in the *Family Law Act*: What Impact for Children’s participation at 88 and 89.

<sup>59</sup> At 91.

<sup>60</sup> At 89.

<sup>61</sup> *Teoh* (1995) 183 CLR 273.

earlier. Un-incorporated, ratified international treaties such as the Convention are a necessary consideration in determining decisions affecting children and young people.<sup>62</sup> It is a fallacy to argue that the Courts have accepted a principle under the common law that international obligations form part of the judicial framework and are a necessary consideration, and then go on to suggest that because the Convention has not been incorporated into domestic legislation it has no influence on decision-makers. Subject to parliamentary sovereignty, decision-makers are obligated to follow leading decisions of the Court in exercising their powers.

The second argument requires a contextual consideration of how the Courts approach the application of the Act in question. It is widely accepted that the application of the Oranga Tamariki Act in respect of Youth Court matters is strongly guided by the principles and objects of the Act.<sup>63</sup> This was the underlying justification for the reform of the s 5 principles to enact a child-centred approach. Every decision made looks to balancing the competing principles and interests to meet the overall objective of the Act, that is, to enhance the wellbeing of children and young people.<sup>64</sup> Thus, while perhaps in the Australian context this point carries weight, it is clear the principles of the Oranga Tamariki Act underpin and guide the whole decision-making process undertaken by the Court and has a significant impact on individual decisions.

After consideration of the legislative context and international comparisons, a broad approach to the interpretation of s 5(1)(b)(i) as giving effect to formal incorporation of the rights set out in the Convention cannot be sustained. Section 5(1)(b)(i) is better considered as creating a requirement that Convention rights should be central to decision-making concerning children and young people. There is an argument this merely affirms what the Court's have undertaken to do already, that is, consider the relevant rights and obligations of the Convention alongside the s 5 and s 208 principles of the Oranga Tamariki Act in judicial decision-making.

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<sup>62</sup> See *Tavita v Minister of Immigration* above n 21; *Police v DP* above n 23, *Police v SD* above n 25.

<sup>63</sup> Above n 1, at [7].

<sup>64</sup> Section 4.

## *VI. Judicial decision-making*

### *A. Fictional Case of JP*

Imagine a 16-year-old girl, JP, is brought before the Youth Court for one charge of aggravated robbery. JP has admitted to the offending, which she carried out with her older brother, and the Court is considering whether JP should be transferred to the District Court and convicted under s 283(o).<sup>65</sup> There are significant welfare concerns about JP which are believed to have contributed to her offending. JP has an Aunt who has had care of JP since she was young during which time JP did not engage in offending and showed significant positive development. It is only since she moved to live with her father at age 15 that she begun to get in trouble with Police and commit crime.

Under the amended Oranga Tamariki Act, JP's youth advocate wants to argue that giving effect to s 5(1)(b)(i) by placing JP's wellbeing at the centre of the decision-making and respecting and upholding JP's rights under the Convention means a s 283(o) order should not be granted. JP's youth advocate argues that an s 283(o) order fails to recognise JP's right as a child under the Convention not to be dealt with in the adult system.<sup>66</sup> Further, if an s 283(o) order is made, JP is likely to be sentenced to a term of imprisonment in the adult court. Given the lack of suitable facilities for young women in prisons, it is likely that JP would serve a sentence of imprisonment in an adult prison where she would come into contact with adult female offenders. This is not only likely to be detrimental to JP's wellbeing but fails to uphold her rights under the Convention.

A judge presented with these arguments would have two options before them. First, to consider these submissions and make the order on the basis that the seriousness of the offending justifies a s 283(o) order, or, accept that s 5(1)(b)(i) imposes a requirement that a child's or young person's rights under the Convention must be respected and upheld, and decline to make a s 283(o) order on this basis.

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<sup>65</sup> Oranga Tamariki Act, s 283.

<sup>66</sup> Article 37.

Prior to the passing of the Legislation Act, it is likely a Judge presented with a young person in the position of JP would consider the young person's rights under the Convention regardless of any legislative requirement to do so.<sup>67</sup> Section 5(1)(b)(i) reinforces this consideration providing that in exercising powers under the Oranga Tamariki Act, the young person's rights must be respected and upheld. However, the power to make an s 283(o) order is provided for under the Act. By retaining the s 283(o) order in the amended legislation, Parliament has expressed its intent that where offending is serious enough, it is appropriate for a young person to be dealt with in the District Court. On this basis, given JP's significant welfare issues linked to the offending, the Court may be persuaded that it is in JP's best interests, and most consistent with the Convention rights for JP to remain in the Youth Court. However, for another young person who does not have these same welfare issues, s 5(1)(b)(i) is unlikely to be sufficient to prevent an s 283(o) order being made.

#### *B. Police v SD*

This case of JP reflects the circumstances of SD, a young person before the Principal Youth Court Judge Walker in March 2018.<sup>68</sup> *Police v SD* concerned whether the young defendant should be transferred to the District Court for sentencing under s 283(o) and was decided under the law prior to the Legislation. Judge Walker sets out the s 208 Youth Court principles and notes these particular principles are subject to the general principles in s 5 of the Act.<sup>69</sup> Judge Walker goes on to say "I also need to take into account Article 37(b) of the United Nations Convention on the rights of the child".<sup>70</sup> This language is explicitly clear. Judge Walker considers the relevant rights under the Convention to be a necessary consideration on equal footing as s 208 and s 5 principles in making his decision. This can be contrasted with the language used in reference to the Beijing rules, that is "I also bear in mind Rule 19 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice".<sup>71</sup> This change in language from "need" to "bear in mind" suggests the

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<sup>67</sup> see *DP v R* above n 23, *Police v SD* above n 25.

<sup>68</sup> *Police v SD*, above n 25.

<sup>69</sup> At [3] and [4].

<sup>70</sup> At [5].

<sup>71</sup> At [5].

Convention holds a special standing, without legislative recognition, in judicial decision-making for issues concerning children and young people in youth justice.

Judge Walker concludes that looking only at a punitive response, a transfer to the District Court would be the right response, but this would fail to take into account other mandatory factors weighing against transfer.<sup>72</sup> Judge Walker explains, “a solely punitive response would fail to take into account the Convention and the Beijing Rules”.<sup>73</sup> Judge Walker notes the importance of making a decision with consideration to the Convention, in applying a principle-guided approach consistent with the Legislation Act. On the basis of this decision, it appears s 5(1)(b)(i) merely provides for what the Youth Court already practices.

The application of s 4A(2) should also be considered. The Oranga Tamariki Act does not provide for the best interests of the child or young person to be the primary consideration under s 6 in youth justice matters. Section 4A(2) of the Legislation Act provides the well-being and best interests of the child or young person in youth justice matters should be a primary consideration alongside the public interest, the interests of any victim, and the accountability of the child or young person. Thus, JP’s best interests are one consideration to be balanced against other interests. In balancing these four interests, the decision-maker should have regard to s 208 and s 5 principles.<sup>74</sup> That is not to say that s 5(1)(b)(i) can be relied on as the sole justification for making a decision that is in the best interests of the young person, but that s 5(1)(b)(i) can be considered when giving appropriate weight to each factor.

JP’s youth advocate can argue under this section that a s 283(o) order with the likely result of a sentence of imprisonment is not in JP’s best interest and will not serve the public interest as JP will likely be influenced by adult offenders. Further, a lesser sentence would still achieve holding JP accountable for her actions. If the victim is supportive of JP remaining in the Youth Court, and JP is not deemed to be a risk to public safety, a Judge may be persuaded on the basis of s 4A(2) not to make a s 283(o) order. This outcome serves the interests of a young person well and reflects the child-centred approach of the Legislation Act. However, it is likely a proficient

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<sup>72</sup> At [43].

<sup>73</sup> At [43].

<sup>74</sup> Section 4A(2).

youth advocate would have made these arguments prior to the Legislation Act in reliance on *DP v R* where the Court stated “the child’s best interests shall be a primary consideration”.<sup>75</sup> Thus, while section 4A legislatively provides for this consideration, it is arguable it does not add anything to the scope of legal arguments that could be heard by the Court prior to the amendment.

### *C. Police v BM*

This application of s 4A(2) to JP’s case is consistent with the Youth Court Judgment of *Police v BM* where the Youth Court considered the relevance of the best interests principle prior to the Legislation Act.<sup>76</sup> Fitzgerald J sets out the relevance of international instruments in reaching his decision on whether to make a s 283(o) order and says that “while the provisions of the Convention do not override the provisions of the Act, they do offer helpful guidance on how to interpret and apply the statutory provisions, particularly in a case such as this where there is tension between taking a welfare focussed approach or a criminal justice focussed approach”.<sup>77</sup> He also says “the wording of article 3 is for the child’s best interests to be a primary consideration, not the primary consideration. So other factors, including the interests of others, in this case the victim, should be considered”.<sup>78</sup> This is consistent with the expected application of s 4A(2). It is clear the Court, prior to the Legislation Act used the rights set out in the Convention to guide their decision-making, and resolve tensions between possible interpretations. *Police v BM* further demonstrates that s 5(1)(b)(i) legislates the current practices of the Court, but is unlikely to impose any further requirements for consideration of Convention Rights.

## *VII. Conclusion*

The Legislation Act goes some way towards bringing the Oranga Tamariki Act and New Zealand practices in the treatment of children and young people in the youth justice system into line with the rights and obligations set out in the Convention. A review of the Court’s approach to the application of the Convention over the last 20

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<sup>75</sup> *DP v R*, above n 19, at [10].

<sup>76</sup> *Police v BM* [2016] NZYC 162.

<sup>77</sup> At [37].

<sup>78</sup> At [30].

years demonstrates the fundamental importance of the Convention as a guiding instrument in judicial decision-making. However, significant carve outs in the Legislation Act for 17 year olds who commit certain offences, and substantive legislative inconsistencies within the Act itself mean a comprehensive affirmation of the Convention rights is merely aspirational.

Parliament has not clearly expressed its intention to implement the Convention into domestic legislation as it did with the Hague Convention in s 3, COCA. Rather it has legislated that decision-makers under the Act should be guided by the principles in s 5 including that the rights set out in the Convention should be respected and upheld. As discussed, s 5 does not call for a strict application of the principles but provides that the principles listed should be used as guidance when exercising powers under the Act. To say s 5(1)(b)(i) formally incorporates the Convention rights, and requires all decisions made under the Act to be consistent with these rights, undermines the clear and ordinary meaning in s 5(1), that is, “any court that, or person who, exercises any power under this Act must be *guided* by the following principles”.

On this basis it is concluded that through s 5(1)(b)(i) Parliament intended to indicate its agreement with the Court’s current use of the Convention and ensure the Convention continues to be used as a guiding instrument for all decision-makers under the Act. To interpret s 5(1)(b)(i) as a formal incorporation of the rights set out in Convention would go too far. Unless Parliament clarifies that it was Parliament’s true intention for s 5(1)(b)(i) to give the rights set out in the Convention the force of law, it is likely the scope of decision-making employing the Convention will not change drastically come June 2019.

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